No. 237.

Brf. of Poe for Appellee

Office Supreme Court U. S.
FILED
MAR 27 1902
JAMES H. McKENNEY,
Clerk.

Filed March 27, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 237.

LOUIS BEYER, APPELLANT,

vs.

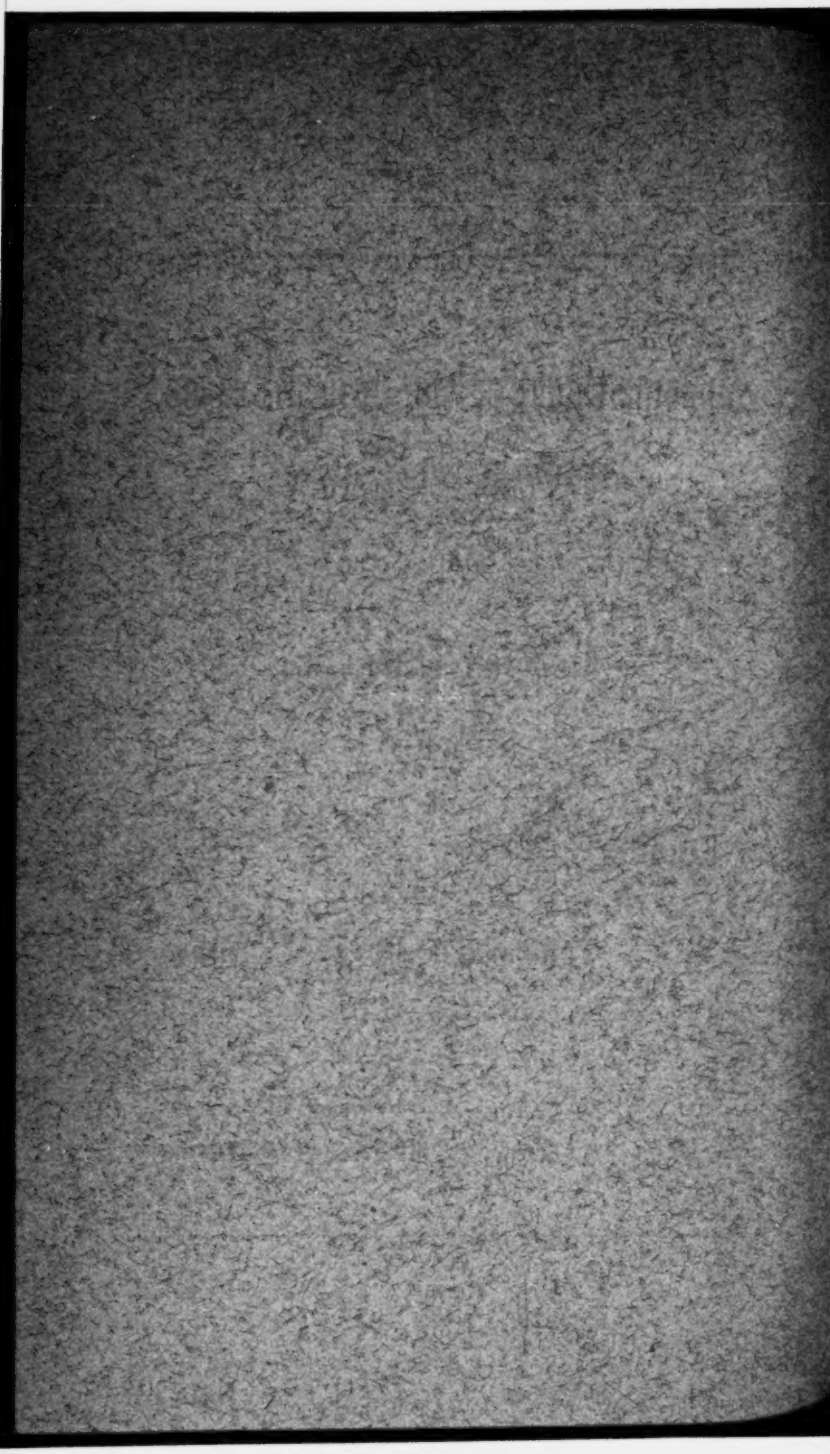
CAROLINE LE FEVRE.

APPELLEE'S BRIEF.

CHARLES POE,

Of Counsel for Appellee.

BYLAND, LAW PRINTER, 416 F STREET, N. W., WASHINGTON, D. C.



IN THE

Supreme Court of the United States.

OCTOBER TERM, 1901.

No. 237.

LOUIS BEYER, APPELLANT,

vs.

CAROLINE LE FEVRE.

APPELLEE'S BRIEF.

This is an appeal from a decree of the Court of Appeals of the District of Columbia by Louis Beyer, the elder, which decree was passed on the 6th day of December, 1900, and affirmed a decree of the Supreme Court of the District of Columbia passed on the 16th day of May, 1900. (Record, page 142.)

All other persons who were appellants in the Court of Appeals of the District of Columbia, refused to join with the appellant in his appeal to this Court, and an order of severance was passed, and he was allowed to prosecute his appeal separately in his own behalf. (Record, page 143.)

The facts of the case are very clearly set out in the opinion of the Court of Appeals, delivered by Mr. Chief Justice Alvey, which is to be found on pages 133 to 142 of the Record, but it is considered not improper to give here also, a resume of them.

The appellee is a sister of Mary Beyer who died on the 26th of July, 1896, having on the 14th of that month made what purported to be her will, which is to be found on page 8 of the Record. The appellant was her husband, but they had had no children. The deceased was about sixty-five years of age at the time of her death, and left surviving her, besides her husband (the present appellant) two sisters, the appellee, and one Elizabeth K. Maus, and the descendants of another sister, who had died during her lifetime. It is conceded that she owned the equity in valuable real estate in the District of Columbia, which was subject to a deed of trust, but left hardly any personal property. The paper writing purporting to be her last will, and testament, after mentioning her husband, and, what it is now contended by the appellant were her wishes as to him, and leaving five dollars each to her sisters and one of her nieces, devised the residue of her estate to her nephew, Louis Beyer, Jr., whose right name was Charles Louis Smith, the child of a deceased sister, and her niece Helen B. Johnson, the child of a living sister, Elizabeth K. Maus, as tenants in common, and appointed Louis Beyer, Jr. her executor without bond. It is also conceded that this paper was offered for probate on the 20th day of August, 1896, and that letters testamentary thereupon were granted to Louis Beyer, Jr. on Sept. 25th, 1896. It will be observed that at that time the Orphan's Court in the District of Columbia had no jurisdiction as to wills devising real estate, that jurisdiction not having been conferred upon that Court until June, 1898.

Campell *vs.* Porter, 162 U. S., 418.

It is also conceded that since the death of Mary Beyer Elizabeth K. Maus, who was a sister of Mary Beyer, the alleged testatrix, conveyed to the defendant, Helen B.

Johnson, who was her daughter, whatever interest she might have had in the estate of Mary Beyer, and it is also admitted that Elizabeth K. Maus, has since died.

On April 7th, 1899, the appellee exhibited her bill of complaint against the present appellant and others in interest setting up the above facts, among others, alleging that the title of the said Mary Beyer to her real estate situated in the District of Columbia, was but an equitable one, and further alleging that the said Mary Beyer was not competent to make a will, and that the paper bearing date the 14th day of July, 1896, purporting to be a will had been obtained by fraud and undue influence, and praying that it might be so decreed; asking also for an account of the rents, issues and profits of the estate, and that a mortgage deed of trust put upon the property after the death of the said Mary Beyer by the present appellant might be decreed to be invalid as being a cloud upon the appellee's title, and also praying for general relief. The bill was accompanied by several exhibits showing the nature of the estate held by the deceased, her will, and the deed of trust so alleged to form a cloud on the title of the present appellee. (Record, pages 1 to 12.)

Answers were filed by some of the defendants denying the facts and also denying the jurisdiction of the Court to the same extent as if that point were raised by demurrer, (Record, page 13–18) and the defendant Louis Beyer, the elder, the surviving husband and the appellant in this Court, simply demurred. (Record, 19.) The cause came on to be heard on this state of the pleadings on the demurrers, and after argument, the Court took the papers, and while the matters were being considered by the Court, the following stipulation was entered into and signed by the solicitors for all the parties:

> "It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the Court may make an order certifying issues to be named in said order to be tried by a jury of the Circuit Court, and the finding by said jury upon said issues shall be returned to this Court, whereupon a decree shall be entered in accordance with said findings, all rights of appeal, as in cases of issues from the Orphan's Court, being hereby reserved." (Record, 126.)

All the parties are of full age and under no disability. (Opinion of Court, Record, 116.)

Issues were the same day framed, the parties all consenting to them, and assenting to the passage of the order framing them. (Record, 127.)

The case was then fully tried before a jury according to the rules of common law, and in accordance with the intent of the stipulation of the parties, and the jury by its verdict, decided the paper was procured by fraud and undue influence, and upon a motion for a new trial, the trial judge refused to disturb the verdict, and certified the findings of the jury to the Equity Court for its final action, (Record, p. 130). When the cause came back to the Equity Court for hearing the testimony before the jury which had been taken down stenographically was all read again to the judge who was presiding in that Court, and he also expressed himself as satisfied with the verdict and decreed in accordance therewith. It will thus be seen that the facts of this case have been passed upon by a jury, by the trial judge, refusing to disturb the verdict of the jury, by the Chancellor whose conscience was to be informed and who also was satisfied with that finding, and again by the Court of Appeals. (See Opinion of Mr. Chief Justice Alvey, Record, page 141.)

Points.

I. The estate of which Mrs. Mary Beyer died seized was of a mere equitable character, and under the circumstances ejectment could not have been brought for its recovery.

Lincoln *vs.* French, 105 U. S., 614.
Brobst *vs.* Brock, 10 Wall., 519.
Morsell *vs.* National Bank, 91 U. S., 357.
Van Ness *vs.* Hyatt, 13 Pet., 298.
Bank of Metropolis *vs.* Guttschlick, 14 Pet., 19.

II. At the time of the death of the decedent, the Orphans' Court in the District of Columbia, had no jurisdiction over her real estate, and there was no power in that Court to pass upon the validity or invalidity of her will. The appellee in this case, who claims as *heir-at-law against* and *not under* the paper writing which purported to be the will of the decedent could therefore not appeal to that jurisdiction for protection. There was but one thing therefore, for her to do, and that is precisely what she did do. That is to exhibit her bill in a Court of Equity. The precedents for such a course are ample to justify that adopted by her, and the case chiefly relied upon to established this claim is that of Boyse *vs.* Rossborough, 6 House of Lords Cases, p. 2., in which the facts are strikingly similar to those in the case at bar, and in which all the authorities are reviewed by Lord Cranworth, and his conclusions adopted by that august body. This Court having determined as we have seen, in the case of Campbell *vs.* Porter, 162 U. S., 478, that the Orphans' Court had no jurisdiction over wills devising real estate, and having also decided in the case of Broderick's Will, 21 Wall., 503, that a court of equity has jurisdiction (where no other Court can afford complete relief) to vacate and annul a will, in the present case it became necessary

to review the authorities, as has been so well done in the opinion filed by Mr. Chief Justice Alvey, which will be found on pages 133 to 142 of the record. In this opinion the doctrine adopted by the House of Lords in the case of Boyse *vs.* Rossborough, 6 House of Lords, Cases 2, has been adopted. That was a case in which an heir-at-law sought to set aside the will of his ancestor, on the ground of lack of testamentary capacity and undue influence, by filing a bill of chancery in which he alleged that the estate of his ancestor was subject to mortgages (just as the estate of the decedent, Mary Beyer, in this case is) and that this fact prevented him from instituting an action at law. The house of Lords held that the Court of Chancery had jurisdiction in its descretion to pursue either one of two courses; to wit, either to direct issues to be framed and tried by a jury, or to grant an injunction to prevent the devisees under the will from pleading the fact that the plaintiff's title was but an equitable one. In this case, as in that in the House of Lords, the Court directed issues to be framed. It was simply a matter of discretion and not of jurisdiction,

III. The parties to the cause consented to the mode of procedure by their solemn agreement filed in the cause, and sanctioned and confirmed by the Court, had their trial by jury, by the same tribunal, and in the same mode and manner that they would have had in an action of ejectment, and it is at least pardonable in us to characterize their present attitude as one not entirely fair to the Court or opposing counsel. They lost their cause after a fair trial in a tribunal of their own selection.

SUPPOSE THEY HAD WON IT!!!

IV. It is too late to object to the manner chosen to have a jury trial.

Strong *vs.* Willey, 104 U. S., 512–515.

V. This Court will not disturb the decree upon the facts unless the conclusions reached by the lower Courts upon them be glaringly erroneous. As has been seen, the jury found them, the trial judge refused to disturb the verdict of the jury, the chancellor was satisfied with the verdict, and so was the Court of Appeals. It is a rule of this Court that when two lower Courts have agreed in their findings of facts, they are conclusive upon it, unless something practically equivalent to fraud appears upon the face of the Record.

Workman *vs.* Mayor of New York, 179 U. S., 555.
The Carib Prince, 170 U. S., 655–658.
Stewart *vs.* Hayden, 169 U. S., 114.
Compania de Navigation, etc. *vs.* Brauer, 168 U. S., 104.

THE FACTS.

VI. Even if this were not the rule of this Court, the jury and all the Courts which have passed upon the facts in this case, were undoubtedly right in their verdict and decrees. The pretended testatrix was dying of a cancer which was maglignant, progressive and incurable. She was being fed on champagne, and drugged with morphine to alleviate her pain—not to cure her. She made three wills within forty-eight hours, and died within twelve days. During most of this time she was in a comatose condition. She could only be induced to make a will after she was told that, having had no children, in case of intestacy, her husband would get nothing. Her primary object in making a will was that he might take, and by each of the three papers which she is said to have executed, she disinherited him. He was not aware of the fact of the execution of these wills, nor present when they were signed. He did not know of them until after her death, and became so indignant when he heard she had

left a will, that the residuary legatees in their fright gave him a deed to half of the property to appease his righteous indignation, He, who knew her best of all people on earth, did not take the witness stand to say that she was competent to make a will. They had lived together forty-five years, were living together when these papers were signed, and he was not only not consulted, but the facts were concealed from him. He and she had earned together by their joint toil the money that bought the property, and it is said that she of her own volition devised it away from him.

WAS IT A NATURAL WILL?

The man who drew the will had never seen her until he went to her room and announced himself as the man who had been sent by her nephew to draw her will. These few facts are sworn to by the witnesses for the defendants. There are many more to which the attention of the Court will be called at the hearing. We think that the decree is proper and just and respectfully submit that it should be affirmed.

CHARLES POE,
Of Counsel for Appellee.

No. 237.
Brief of Emig for Appellee
Office Supreme Court U. S.
FILED
APR 15 1902
JAMES H. McKENNEY,
Clerk.
Supreme Court of the United States.
Filed April 15, 1902.

OCTOBER TERM 1901. NO. 237.

LOUIS BEYER, Appellant,

vs.

CAROLINE LE FEVRE.

APPEAL FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE APPELLEE.

CLAYTON E. EMIG,
Attorney and Solicitor
for the Appellee.

Saxton Printing Co.
Washington, D. C.

27081

IN THE

Supreme Court of the United States.

OCTOBER TERM 1901.

No. 237.

LOUIS BEYER,
Appellant,

vs.

CAROLINE LEFEVRE.

BRIEF FOR THE APPELLEE.

STATEMENT OF FACTS.

In opposing this appeal, nothing will aid the Court so much in considering the same, as an adequate history of the controversy from the outset. It has already been stated in the opinion of Mr. Chief Justice Alvey, on page 133 of the record, that the appellant was the husband of Mary Beyer,

who died on the 26th day of July, 1896, at the age of about 65 years. The deceased left no children surviving her, but a husband, two sisters, and two descendants of a pre-deceased sister. Little or no personal property has been disclosed by those who had charge of her estate.

She owned, at her death, the right of an equity of redemption in valuable real estate lying in the District of Columbia, the legal estate being vested in certain trustees, by virtue of a certain deed of trust, to secure the sum of twenty-eight hundred ($2,800) dollars, money loaned to said Mary Beyer.

On the 29th day of August, 1896, there was filed in the office of the Register of Wills, for the District of Columbia, a certain paper-writing, purporting to be the last will and testament of Mary Beyer, which was probated as a will of personalty.

By the terms of said paper-writing, the said Mary Beyer gave five dollars to each of her two sisters, and one niece, a descendant of a pre-deceased sister, and pretended to devise the residue of her valuable estate to her nephew, Louis Beyer, Jr. (whose right name was Charles Louis Smith), another descendent of said pre-deceased sister; and to her niece, Helen B. Johnson, as tenants in common; and appointed said Louis Beyer, Jr., her executor, without bond. (Record p. 8.)

The appellee filed her bill in equity in the Supreme Court of the District of Columbia on the 7th day of April, 1899, the substance of which is vividly set forth in the opinion of Mr. Chief Justice Alvey on pages 133–135 of the record.

On the 12th day of April, 1899, the equity court passed an order, that the prayer for the writ of injunction and order appointing a receiver contained in the bill be set down for hearing on Tuesday, the 18th day of April, 1899, at 10 o'clock a. m., provided a copy of said order be served on the defendants, or their solicitors on or before April 14th, 1899.

(Record, p. 12.) This order having been complied with, all the defendants named in the bill appeared in court on the day and at the hour named.

The defendants, Louis Beyer, Jr., in his own right and as executor, and also Helen B. Johnson, each filed a separate answer to the bill of complaint, and at the conclusion of each answer they each submit the same as a response to the rule to show cause. Each answer admits many of the averments of the bill, but denies the charge of fraud, and that said Mary Beyer was incapable of executing a valid deed or contract. Each answer also raises the question as to the jurisdiction of the court as if they had demurred to the bill. On the same day the defendants, Cohen and Wolf, trustees, appeared and filed their joint answer to the bill, avering on information and belief that the deed of trust to them by Louis Beyer, Sr., is a valid lien on said real estate. They also make objection to the jurisdiction of the court as if raised by demurrer, and submit their answer to the bill as a response to the rule to show cause. The defendants all appeared by counsel at the hearing of the bill, answers, and demurrers. Upon consideration of the pleadings, the court ordered that the rule to show cause, passed on the 12th day of April, 1899, be discharged, and the complainants motions for a receiver and injunction be denied. (Record, p. 19.)

The court, however, retained the bill, answers and demurrers therein contained, of the defendants. While the court was so considering the same, no steps were taken by either party to the cause, until the 20th day of June, 1899, when the following stipulation for trial by jury was formulated and agreed upon between all the parties to the cause, which stipulation was signed by every solicitor representing a party to the cause. It reads as follows:

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

LEFEVRE
vs.
BEYER ET AL
} Equity No. 20,324.

It is hereby stipulated by and between the parties to this cause this 20th day of June, 1899, that the court may make an order certifying certain issues, to be named in said order, to be tried by a jury of the circuit court, and that the findings by said jury upon said issues shall be returned to this court; whereupon a decree shall be entered in accordance with said findings, all rights of appeal, as in cases of issues from the orphans's court, being hereby reserved. (Record, p. 126.)

On the same day, to wit, June 20th, 1899, the following order framing issues to be tried by a jury, and certifying the same to the circuit court was prepared and assented to by each solicitor representing a party to said cause, as is evidenced by their respective signatures. The order was then presented to the court (Cole, *J.*), for signature who, up to that time, held all the papers in said cause under advisement. It reads as follows.

Ordered by the court this 20th day of June, 1899 (the parties to this cause consenting hereto), that the following issues to be tried by a jury be, and they hereby are, certifiied to the circuit court, to wit;

First. Was the said Mary Beyer, at the time of the alleged execution of the paper-writing bearing date the 14th day of July, A. D. 1896, and purporting to be her last will

and testament, of sound and disposing mind, memory and understanding, and capable of executing a valid deed or contract?

Second. Was the execution of said paper-writing, bearing date the 14th day of July, 1896, and purporting to be the last will and testament of the said Mary Beyer, procured by fraud, circumvention, or undue influence practised or exercised upon the said Mary Beyer by Louis Beyer, Jr., Helen B. Johnson, or by either of them, or by any other person?

Third. Were the contents of the paper-writing, bearing date July 14th, 1896, and purporting to be the last will and testament of said Mary Beyer, known to her at the time of the alleged execution thereof?

We assent to the passage of the above order. (Record, pp. 126 and 127.)

The above named issues were, on the 20th day of June, 1899, certified to the circuit court for trial in accordance with the stipulation. (Record, p. 20.)

No further action was taken by either party to the cause until the trial of said issues on the 6th day of December, 1899, nor did the court hand down any decision upon the questions submitted for its consideration on the 18th day of April, 1899.

At the trial of said issues, to wit, December 6th, 1899, all the parties to said cause appeared in open court, and submitted to the trial of the issues certified to said circuit court for said trial by jury. The proceedings were prolonged for some days, and each defendant, represented by counsel, took part and hotly contested each step.

The jury, after careful deliberation, found "that while the deceased was of sound and disposing mind and knew the contents of the paper, yet the execution of the same

was procured by fraud, circumvention or undue influence." The defendant, Louis Beyer, Sr., alone filed a motion for a new trial, based upon seven different grounds, none of which, however, raise the question of the jurisdiction of the court. (Record, pp. 129 and 130.)

On the 6th day of January, 1900, the court (Cole, *J.*), who had presided at the trial of the issues, and had lately been transferred from the equity court to the law court, after a full hearing, on the grounds alleged in said motion, overruled the same, and certified the findings of said jury back to the equity court, from whence they had come. (Record, p. 130; also, p. 20.)

On March the 8th, 1900, after said issues had been returned to said equity court, all the parties, by their solicitors, again stipulated (the issues of fact having been found against the will, both by the jury and the trial court), that the testimony and proceedings had on the above stated issues before Mr. Justice Cole and a jury may, together with the motions for a new trial and the order of the court made in the matter, and all orders and proceedings passed or had therein, be produced and considered by the court as part of the record on hearing in the equity court of this cause, and in any appellate court to which said cause may be carried by either party. (Record, pp. 27 and 28.) This stipulation was agreed to and signed by every solicitor for the respective parties. At the hearing before the Chancellor, all the testimony was read, as well as all the proceedings had before said jury; the conscience and good judgment of the Chancellor (Barnard), was satisfied with the evidence and verdict, and all the proceedings. He rendered an opinion on the 14th of May, 1900 (Record, p. 116), and on the 16th day of May, 1900, passed a decree declaring that said paper-writing was not the last will and testament of Mary Beyer, and that she died intestate as to her real estate. (Record, p. 121.)

From this decree Louis Beyer, Sr., as well as the defendants below, Louis Beyer, Jr. and Helen B. Johnson, appealed to the Court of Appeals of the District of Columbia; and upon consideration thereof by the said court a decree was passed on the 6th day of December, 1900, affirming the decree of the said Supreme Court of the District. On the 20th day of December, 1900, the said Court of Appeals passed an order of severance. It appearing to said court that the said Louis Beyer, Jr. and Helen B. Johnson refused to join Louis Beyer, Sr. in his appeal to this Court.

ARGUMENT.

I.

THE EQUITY BRANCH OF THE SUPREME COURT OF THE DISTRICT OF COLUMBIA, HAD JURISDICTION TO ENTERTAIN THE BILL OF COMPLAINT.

This proposition is clearly established by the rule laid down by this Court in the Broderick Will Case, 21 Wall., 503. This Court, by Mr. Justice Bradley, speaking first of the general rule established both in England and this country, that a court of equity will not entertain jurisdiction of a bill to set aside a will or the probate thereof, where the ecclesiastical courts, or the probate courts in this country furnish adequate relief, said:

> "The public interest requires that the estate of deceased persons, being deprived of a master and subject to all manner of claims, should at once devolve to a new and competent ownership, and, consequently, that there should be some convenient jurisdiction and mode of proceeding by which this devolution may be effected with the least chance of

injustice and fraud, and that the result attained should be firm and perpetual.

"The courts invested with this jurisdiction should have ample power both of process and investigation and sufficient opportunity should be given to check and revise proceedings tainted with mistake, fraud and illegality.

"These objects are generally accomplished by the constitution and powers which are given to the probate courts, and the modes provided for reviewing their proceedings.

"One of the principal reasons assigned by the equity courts for not entertaining bills on questions of probate is that the probate courts themselves have all the powers and machinery necessary to give full and adequate relief."

In the city and county of San Francisco, where the Broderick will was probated, the orphans' court had full power and jurisdiction to probate both a will as to personal and real property.

Continuing Mr. Justice Bradley said in the above case:

"In view of these provisions it is difficult to conceive of a more complete and effective probate jurisdiction or one better calculated to attain the ends of justice and truth."

"It seems therefore to be the settled law in England that the court of chancery will not entertain jurisdiction of questions in relation to the probate or validity of a will which the ecclesiastical court is competent to adjudicate."

And concluding—

"IT WILL ONLY ACT IN CASES WHERE THE LATTER COURT CAN FURNISH NO ADEQUATE REMEDY."

Numerous English decisions sustain the above proposition that equity has jurisdiction to entertain a bill like the one at bar, and hold that the heir at law may have an issue *devisavit vel non*, or is entitled to have all technical obstacles to an ejectment removed. The court, however, is not bound to adapt one of these courses in preference to the other, but may take either in its discretion, so that it may direct an issue, and afterwards at the desire of the heir, changed the order, and direct an ejectment.

The present bill alleges, and the findings of the jury confirm, that the paper-writing was procured by fraud and undue influence; that the estate of the supposed testatrix was but an equitable interest in certain real estate. Is not a court of equity preeminently the proper tribunal for the consideration of these questions? Is not the jurisdiction of equity, in matters involving fraud, almost without limit? Richmond *vs.* Taylour, 1 P. Wms., 734.

The same principle was adapted in Barnesby *vs.* Powel, 1 Vez. Sen., 119.

A demurrer was sustained in Jones *vs.* Jones, 3 Mer. 161, not for want of jurisdiction, but because the bill did not disclose sufficient grounds for the interference of a court of equity and because the bill was multifarious. No stipulation had been filed in the Jones case assenting by all the parties to said cause that issues be sent to a jury for trial, but Sir W. Grant, Master of the Rolls said:

> "Although there may have been instances of an issue directed and the bill of an heir-at-law, where no opposition has been made to that mode of proceeding, yet I apprehend that he cannot insist on any such direction."

The case at bar falls within the exception, as the appellant expressly assented to the mode of proceeding.

The Lord Chancellor in Boyse *vs.* Rossborough, 6 H. L.

C., p. 42, commenting upon the opinion of Lord Eldon, in Pemberton *vs.* Pemberton, that there is great convenience in directing the heir to bring his ejectment, provided the defendant should not set up at law a term satisfied or unsatisfied, rather than by directing issues to obtain relief, said:

> "I cannot interpret this language as meaning anything else than this, that the usual and generally more convenient practice is to enable the heir to proceed by ejectment, *but that it is open to the court to direct an issue, if from any cause that course appears desirable.*"

The appellee avers in her bill that Mary Beyer conveyed in fee simple all the real estate of which she was siezed and possessed to certain trustees, and that said legal title to said real estate thereby conveyed has never been released, retransferred, or reconveyed by said trustees to said Mary Beyer, but is still outstanding in them. (Record, p. 2.)

That Louis Beyer, Jr., and Helen B. Johnson induced said Mary Beyer to affix her name to a certain paper-writing, when she was both mentally and physically unable to resist their importunities, and was not a free agent to dispose of her estate; that by said paper-writing the entire estate of Mary Beyer is devised to said Louis Beyer, Jr. and Helen B. Johnson; that soon after the death of said Mary Beyer, the said supposed devisees, Louis Beyer, Jr., and Helen B. Johnson, conveyed a portion of said real estate, of said supposed testatrix to Louis Beyer, Sr., the appellant, in consideration of the said grantee dismissing a certain caveat he had theretofore filed, protesting against the probate of said paper-writing; that said grantee on May 12, 1897, conveyed to the defendant trustees all of the property conveyed to him by the said supposed devisees, Beyer, Jr., and Johnson, which property is a portion of the said real estate and equity of

redemption of which the said Mary Beyer died, siezed or possessed.

It is submitted that the above averments sufficiently set forth that said estate of the supposed testatrix is an equitable estate; that said conveyance to the appellant sets up said paper-writing as a will of real estate, and that said appellant or his grantees are in possession of said real estate.

It was declared in the case of Armitage *vs.* Wadsworth, 1 Madd. 187, that *but for the averment of there being outstanding terms* such a bill would be a mere ejectment bill by an heir-at-law out of possession praying an issue, stating no impediment to the assertion of his right at law, and therefore not sustainable. In this case more than outstanding terms are alleged to give the court jurisdiction.

And so this Court held in the case of Ellis *vs.* Davis, 109 U. S., 499, where an heir-at-law filed a bill in equity to set aside the probate of a will in Louisiana, to recover the real estate and an accounting from an adverse party in possession under the will, relief was denied on the ground that the heir claimed the legal title to the real estate, the recovery of which was provided for in an action of revendication, giving the heir a plain, adequate and complete remedy at law.

A similar doctrine was laid down by this Court in the case of Traver *vs.* Traver, 9 Peters, 180. Here the heir-at-law filed an *original* bill in equity to set aside the probate of a will. This Court did not hold that a court of equity has no inherent power to set aside a will or the probate thereof, but that the laws of the State (Alabama) have provided full and adequate relief by a different procedure to accomplish the same ends, namely, by an *appeal* within five years from the tribunal which probated the will. While the foregoing citations sustain the proposition that a court of equity will not take jurisdiction to set aside a will in cases where the orphans' court has full power and jurisdic-

tion to admit to probate a will of real estate; they also clearly decide, that a court of equity will act in cases where the orphans' court is not vested with the power and jurisdiction necessary to give adequate relief; and where the right of appeal does not exist; and where the common law can give no relief in the trial of wills of real property, by the action of ejectment.

The appellee needs, therefore, only to ascertain, *first*, whether the Supreme Court of the District of Columbia, holding a special term for orphans' court business had power and jurisdiction to admit to probate a will as to real estate at the time of the death of the said Mary Beyer, to-wit, July 26th, 1896; *second*, if no such jurisdiction existed in the said orphans' court, whether the appellee at any time possessed a sufficient legal title to sustain an ejectment.

As to the power of the orphans' court in this district to admit to probate a will of real estate in 1896, this Court, speaking by Mr. Justice Gray, in the case of Campbell *vs.* Porter, 162 U. S., 478, decided that by the common law and the old law of Maryland, at the time of the establishment of the District of Columbia, wills, so far as real property is concerned are not admitted to probate in the Orphans' Court of the District.

This Court cites with approval the language of Mr. Justice Johnson in Darly *vs.* Mayer, 10 Wheat, 465, 471, 472, wherein he construes the older laws of the State of Maryland concerning wills, as amended and codified by the statute of 1798, chapter 10, and published in 2 Kilty's laws; concluding Mr. Justice Johnson says:

> "But it is equally true that the act does not authorize the registering of any will without probate. Nor does it in any one of its provisions relate to the probate of any will except wills of goods and chattels."

Congress passed no legislation, nor in any way supplimented the Maryland statute of 1798, until the act of July 9th, 1888, chapter 597, relating to the record of wills in the District of Columbia, which was declared an act of evidence and not of jurisdiction. Says Mr. Justice Gray in Campbell v. Porter:

> "The act assumes the probate to have been lawfully made; and it no more undertakes to define or regulate the jurisdiction of the courts of probate of the District for the future, than it does the jurisdiction of those courts in the past, or the jurisdiction of the courts elsewhere, whose proceedings filed here are equally made evidence."

The appellant, doubtless, concedes that this was the status of the law relating to wills of real estate in force in the District, *until the passage of the Act of June 8th, 1898*, which conferred plenary jurisdiction upon the Supreme Court of the District of Columbia, holding a special term for Orphans' Court business, to hear and determine all questions relating to the execution and to the validity of any and all wills devising any real estate within the District of Columbia, and to admit the same to probate and record in said special term.

It seems, therefore, conclusive, that the Orphans' Court o this District, had *no jurisdiction* to admit to probate and record the said paper-writing of the said Mary Beyer, as a will of real estate. Nor could the appellee have offered said paper-writing for probate in said Orphans' Court after the passage of said act of June 8th, 1898, for the sole purpose of attacking it, when she denied its validity, though she might have contested its validity, if any of those interested under said will had offered it for probate as a will of real estate, which course, however, seems to have been cautiously avoided by the devisees thereunder.

II.

Could the Appellee at any time have prosecuted an ejectment suit at common law against the Devisees and their Grantee in possession of said real estate?

In this respect the appellee was confronted with the fact that the decedent was the owner of but an equitable title. The said Mary Beyer had but a mere right of an equity of redemption to the real estate she attempted to devise. The legal title having been conveyed by the said Mary Beyer, and this appellant, to the trusees therein named, it would seem that said fee simple title remained in the said trustees until the "sale," "conveyance," and "payment," as thereinafter provided, namely: "on the full payment of said notes and interest thereon and all sums advanced or expended in respect of this trust, *to RELEASE and RECONVEY in fee at the expense of the releasee unto the said Mary Beyer* or the said person or persons then claiming under her the aforesaid land and premises." (Record, p. 6).

It is conceded that the payment of said notes has not been made. So long as the legal fee simple title to said real estate is vested in said trustees, there can be no doubt that the appellees' title to the real estate in question, remains but a mere right of equity of redemption.

The appellant contends, however, that the appellee could maintain the action of ejectment on her title under the deed of trust, and supports his proposition by the case of George Creek's Coal and Iron Co., *vs.* Detmold, 1 Md., 235. True the Maryland court held that such a title as therein described would not be a bar to an ejectment, and said: "Upon the whole, we are of the opinion, *under such a mortgage as that in this case*, that the mortgagor can maintain ejectment against a stranger who rests his defence entirely on posses-

sion and an outstanding title in the mortgagee. The fact is, that the mortgage described in the Maryland case and the deed of trust in the case at bar, are quite dissimilar. Whatever the theory of the law relating to covenants of a mortgage to redemise the fee title to the mortgagor may be, the fact is, that the deed of trust in this case expressly retains the fee title in the trustees *until the full payment of said sum secured thereby.*" (Record, p. 6). However, the case cited is of minor importance as an authority, when this court has spoken upon the very question in a case which arose in this District. Bank of the Metropolis *vs.* Guttschlick, 14 Peters, 29.

The court distinguishes between a mortgage and a deed of trust, declaring that the principle applies more forcibly in the case of a deed of trust; and bases the reasoning on the fact that a mortgage is under the protection of a court of equity. That a decree is necessary to procure a fore-closure, and that even then, the mortgagor is allowed a short time to come in and get an extention in which he may redeem the premises, by paying the debt, while in the case of a trust, a court of equity seldom interferes. *The only right of the grantor in the deed, is the right to whatever surplus may remain after the sale, of the money for which the property is sold.*

In this case, it appears that the bank claimed under a deed from one Kerr, who sold the lot in question as trustee, under a trust from one Orr, made to secure debts, which deed was executed on the 8th of September, 1819. Orr had on the 6th of August, 1818, conveyed same lot, in fee simple, to one Elgar, as trustee, to secure certain debts, with power of sale, in event that one Lane, an endorser of a note secured by the last deed should be sued, which event occurred in 1820. "It appears that at the date of the agreement the bank was not seized of the fee simple which it contracted to convey. If the deed of trust to Elgar be consid-

ered as a mortgage, *then the moment it was executed the legal estate in fee simple was in Elgar*, subject to be defeated upon performance of the conditions, and so continued in him, from that time down to the year 1835, when, under the trust deed, he sold and conveyed the lot to the Patriotic Bank which purchased at the sale.

Refering to the action of the Bank, this court said:

> "There was then a good cause of action, on the ground that the bank had not the fee simple which it contracted to convey."

This Court has held, in the case of Morsell *v.* The Bank, 91 U. S., 357, that a judgment against the grantor of a deed of trust was no lien upon the real estate.

If a judgment had been recovered against Mary Beyer in her life-time, an execution at law could not have been levied upon it, nor would any proceeding, short of a bill in equity, be able to reach her equitable title to said property.

Morsell *vs.* First National Bank, 91 U. S., 357.
Lincoln *vs.* French, 105 U. S., 615.
Van Ness *vs.* Hyatt, 13 Peter, 298.
Bank of Metropolis *vs.* Cuttschlick, 14 Peter., 19.

It is clear, therefore, that there was no jurisdiction in the probate court for the recovery of the land by the heir-at-law to which she was legally entitled by the statute in force in this District at the death of the said Mary Beyer; that the title in and to said land was of an equitable character, and that the legal estate vested in the said trustees. It seems clear, beyond a doubt, that the said appellee could not proceed in an action of ejectment against the devisees under the alleged will of the deceased, the grantor in the deed of trust. See 105 U. S., 614; 10 Wallace, 519; 91 U. S., 357; 13 Peter, 298; 14 Peter, 19.

Relief being, therefore, denied to the heir-at-law under the law in force in the District of Columbia up to the day

of filing this bill both in the probate court, as well as in the court of law, it cannot be doubted that, if the complainant sets up good grounds for filing a bill in equity and alleging that there is a deed of trust outstanding, that she would be entitled to come into a court of equity and have it removed so that the question could be fairly tried in an ejectment suit by a jury, or to have issues framed and sent to a jury for trial. EQUITY WILL NOT SUFFER A RIGHT TO BE WITHOUT A REMEDY.

III.

AS TO EFFECT OF THE STIPULATION OF JUNE 20TH, 1899.

In the case of Strong *vs.* Willey, 104 U. S., 5 2–15, this court held that it was too late to object to the manner chosen of having a jury trial after the ruling has been made by the court; and it therefore follows that when a party to a cause *leads the court to adopt a certain mode of procedure* in a case which the court had the discretion to adopt or not to adopt, the party agreeing to such mode of procedure should not be allowed to object to the course of procedure because the result of the course has been adverse to them. Counsel must *in all fairness to the court* as well as the opposite party explain away the question of consent as to the mode of procedure before launching out upon the course selected. See Reynes *vs.* Dumont, 130 U. S., 354; Kilburn *vs.* Sutherland, 130 U. S., 514; Tayler *vs.* Moses, 13 U. S. 428.

It cannot be seriously contended that the appellant, after interposing a demurrer to the bill, and after the hearing of said demurrer, and while the *result of that hearing* is under consideration by the court, can stipulate that issues be framed under the bill (some of the defendants below having answered the bill in which all the

material allegations were denied and contested) without expressly waiving the full force and effect of said demurrer.

Would it not be a fraud upon the Court to allow the appellant now to insist on objecting to that to which he consented in the court below? The Solicitor-General, in Boyse *vs.* Rossborough, cites Chamley *vs.* Dunsany, in which Lord Eldon condemned such a practice, saying:

> "When those opportunities are passed by, are we not entitled to say the point was waived in the court below in order to make it the subject of appeal here."

The stipulation of June 20th, 1899, expressly provides that "certain issues be tried by a jury of the Circuit Court, and that the findings by said jury upon said issues shall be returned to this Court; whereupon a decree *shall be entered in accordance with said findings.*"

The stipulation further provides that "all rights of appeal as in cases of issues from the Orphan's Court, being hereby reserved.

No such appeal as in cases of issue from the Orphan's Court was taken by either party, which possible right became barred by the lapse of time allowed by the rules of the Supreme Court of the District of Columbia, within which to perfect said appeal npon a bill of exceptions.

The verdict of the jury was rendered on Monday, December 11th, 1899. (Record, p. 20.) No appeal nor bill of exceptions having been presented to the trial court, all the parties to the cause, on the 8th day of March, 1900, stipulated that the stenographic report of the testimony and proceedings had at the trial of the above stated issues before Mr. Justice Cole and a jury, etc., be considered by the Court as a part of the record on the hearing in the equity court of this cause.

This stipulation conferred no new power upon the equity court, further than to consider all the proceedings had be-

fore the trial court and jury, which was intended to enlighten the conscience of the Chancellor and grant a decree in accordance with the prayers of said bill, and the findings of the jury.

The appellant contends that the purpose of the stipulation of June 20th, 1899, was to save time and expense, in that he expected the jury to find in favor of the will, and thus speedily end the litigation; but in equity and good conscience does not that expectation give rise to an obligation that, if said issues are found against the will, said litigation should likewise speedily end?

He who seeks equity must do equity.

If it is possible to give the stipulation the construction now sought to be put upon it by the appellant, would it not permit him to take advantage of his own wrong?

We submit therefore it is now too late for the appellant to say that the issues framed and manner chosen for the trial by jury are not lawful.

This court said in Strong *vs.* Willey, *supra:*

> "The reference of the matter in dispute to the arbitrator, coupled with the agreement that his award should be made the basis of a decree in the suit, is clearly a waiver of the objection that the remedy was at law and not in equity, if any such objections in fact existed, which we are by no means inclined to admit."

IV.

Whether, upon the facts, the verdict of the jury ought to be sustained.

If there should be the slightest doubt upon this proposition, a brief consideration of the testimony will dispel it.

The supposed testatrix was sixty-five years of age; for

some time past had been afflicted with a dreadful disease; at or about the time of the alleged execution of the three separate paper-writings she was so ill that she did not seem to recognize anyone; she could not move about in her bed; she was stupefied by the administration of morphine and champagne, not to cure but to relieve her, ever since she had taken her bed; she was gradually growing worse; her voice was so weak that one had to put his ear to her mouth to understand her; she told the witness "the medicines they were giving her were doing her no good; most of it was morphine to deaden the nerves, but nothing to build her up"; she could not sit up in bed; that for two weeks before her death she could hardly speak or move; when she was too sick to converse with her spiritual adviser; when the man who drew her will was engaged with a street-paving concern, though he had once read law to some extent; he occupied an office right over that of the principal beneficiary, who had requested him to come and draw the will; he had never before seen Mary Beyer; the first thing he said when he saw her was, "Mrs. Beyer, I understand you want to make a will." He drew a will, makes Louis Beyer, Jr., whom he had known for 15 years, sole beneficiary; she signs the paper; he discovers an imaginary error, rewrites the will, returns to her death-bed, reads it over to her, makes other changes in the will; he take it back to his office, makes Mrs. Johnson an equal beneficiary; returns to her the following day (Tuesday), and she signs her third will within forty-eight hours. She, unable to move in her bed, speak even in a whisper, sustained on morphine and champagne, tells the scrivener "she did not want to leave her husband the property because he had already squandered $30,000 of the money she had made, * * * and she was afraid that if she left the property to him, for life even, they might do something with it—entangle it to further his inventions that he was supposed to be carrying on at that

time." She "hoped the two beneficiaries and her husband would live in the house as long as he lived, but he should not restrict the beneficiaries in the sale of it." In the first will she intended to leave the property to Louis Beyer, Jr., *absolutely*. He was to be executor without bond. Louis Beyer, Jr. was present. The scrivener, not a practicing lawyer, a total stranger to Mary Beyer, knew Louis Beyer, Jr. 15 years; knew that he was the executor under the will, and equal beneficiary; their offices in the same building, yet retains the paper until four days after her death. The supposed beneficiaries voluntarily deliver an executed deed to the surviving husband for almost the whole estate on the 31st of July, 1896, only one day after he hears of the existence of the will.

That Louis Beyer, Jr., on the 20th of August, 1896, applied to the court to have his name changed from Charles Louis Smith to Louis Beyer, Jr. Her physician testifies that he is a "specialist in everything," an "all around expert." That when he witnessed the paper, the disease was progressive and incurable.

The subscribing witness, Smith, referring to the second will, on page 70 of the record, says: "When Mr. Brennan came, he proceeded to read a paper which he had prepared, and which as the reading progressed, observed was a draft of a will, by Mrs. Beyer; Mr. Brennan read the will through and when he had concluded the reading, Mrs. Beyer said: "Where is Helen? Where is Helen? You have left Helen out; Helen is to go into the will." Mr. Brennan said: "Who is Helen?" She said. "Why my niece, Mrs. Johnson, she is to have a share with Louis." Does this not show her state of mind as compared with the day previous? That she was given narcotics to relieve her pain, anodyne, in form of opium, powdered opium or morphine. The witness appears at Mrs. Johnson's request; on neither of the three executions of said paper was the husband present; but the

beneficiaries. She asked Louis Beyer, Jr. what her husband would have in event of her dying without a will; she found out that the sisters would be her heirs, without a will. Louis Beyer, Jr., first learned of the contents of the will, the third day after the funeral. He had no knowledge of the contents of the will until August, 1896. (Record, p. 81 and 82,)

"When Mr. Beyer received knowledge that there was a will in existence, he made things very disagreeable with both Mrs. Johnson and me and not as a matter of compromise, but as a matter of duty we both deeded not the rear part, as expressed here, *but nearly all except the home site he had the froutage on Brightwood Avenue as well as the rear, with its improvements by six two-story brick dwellings;*" yet after his deed was given the beneficiaries found things so unbearable that they left the homestead; after he finally vacated the homestead they both returned. The husband was disappointed. He had supposed the property would go to him.

She never intended to make a will until she learned that her husband would not inherit the property. She disinherits her sister whom she had lately given a most affectionate and final farewell. (Record p 34.) *She made the will to protect her husband, and disinherited him of the property which they accumulated by their joint labor.*

The appellant was a party to and represented by counsel at the trial of the issues before the jury, yet he did not take the stand to tell the jury what *he knew* about the facts. He knew Mary Beyer better than any one else; he lived with her 45 years; knew the relations existing between the deceased and the supposed beneficiaries; knew what were the trial issues then being tried, yet he did not deny a single allegation contained in the bill, nor did he take the stand to protect the sacred memory of the deceased; nor the good name of those charged in the issues with procuring the paper-writing by fraud, circumvention or undue influence.

V.

THE FINDINGS OF THE JURY AND THE DECREE OF THE CHANCELLOR WERE ALL RIGHT.

The record shows that the jury reached the verdict only after careful deliberation; the trial court, who saw and heard each witness testify, was well qualified to pass upon the motion for a new trial, overruled the same, and certified the findings back to the equity court.

The Chancellor patiently heard all the pleadings, testimony and proceedings had before the law court, and in a carefully prepared opinion, adopted, ratified and confirmed the findings of the jury. (Record, p. 116). The entire record of all the proceedings was presented to the Court of Appeals of the District. That Court having carefully considered the same, confirmed the decree of the Chancellor. (Record p. 133-142).

GENERAL STATEMENT OF THE FACTS.

WHO WERE THE HEIRS-AT-LAW OF MARY BEYER?

No children having been born to the said Mary and Louis Beyer, Sr., her real estate would descend to her three sisters and their descendants.

Caroline LeFevre, the present appellee, and Mrs. Maus, the mother of Helen B. Johnson, alone survived the deceased. Charles Louis Smith, known in the record as Louis Beyer, Jr., and Helen C. Fenton, are the only descendants of Mrs. Smith, a pre-deceased sister of said Mary Beyer. (Record, p. 97.)

The record shows that the said decedent had often been importuned by the niece, Helen B. Johnson, to make a will, thus prevent the property falling into the hands of the husband. She declined, however, until "she found that

Mr. Beyer would not inherit the property she changed her mind." (Record, p. 92; also, p. 93.)

Witness JOHNSON:

Q. Do you remember whether you arranged for any of the witnesses to be present?

A. She asked me to ask Dr. Smith. She thought about making a will and I asked about it, and the doctor said if she wanted the husband to keep the property, she should have made the will when she bought the property, and I told her that.

This was the same day the first will was made. Up to that time both she and her husband thought he would be her heir. (See Record, p. 95.)

Q. What did Mrs. Beyer say in her conversation about Mr. Beyer in case she did not make a will?

A. That he would be her heir-at-law.

Q. She gave that as her reason why she did not make a will?

A. Yes, sir.

She then makes three wills in 48 hours, devising all the property she then owned, which represented the fruits of their joint labors for 45 years. In the first paper, Sunday, July 12, 1896, she leaves it all to Louis Beyer, Jr., (Charles Louis Smith,) whose sister, Mrs. Fenton, was "awarded" five dollars.

Mr. Brennan, the scrivener, who had never before seen the said Mary Beyer, with commendable forethought, takes the will, devising an estate of $25,000 to his friend of 15 years' acquaintance, to his office, in the same building occupied by his friend. He does not seal and sacredly guard it, but takes it out the following day, rereads it, finds an imaginary error, in that the word "heirs" is omitted, and lest his friend gets but a life estate, he rewrites it and

meets the witnesses in the death-chamber for a re-execution of the paper. This is Monday, July 13th, 1896. (See Record, p. 54.)

Q. How many times did you see Mrs. Beyer before she executed the will?

A. Never saw her before—that is before she executed that will. I saw her twice.

Q. Whereabouts?

A. At her house.

Q. Who was present?

A. Dr. Smith and Mr. Sullivan on *one occasion*, and on *two other occasions* there was Dr. Smith, Dr. Atkinson and I.

Note what Brennan says about this first will. He found a mistake in the first paper, so he burned it up on the Tuesday following at the residence of Mrs. Beyer. (Record p. 54.)

Q. What became of the first paper?

A. I burned it myself.

Q. Whereabouts?

A. I think it was at the residence of Mrs. Beyer.

He flatly contradicts this assertion on page 89 of the Record. He says:

Q. Can you tell us where it was that you burned the first paper which you prepared and which you stated on yesterday you did burn?

A. After the execution of the present will by Mrs. Beyer, I tore the written will up, the will that was written on Sunday afternoon, tore it up. I put it in my pocket, and after I got to my office I burned it up in the grate.

Again he is contradicted on page 59 of the Record. He says on Monday when he returned with the witnesses and with a will already for her signature, which was identical to the one she had signed on Sunday, excepting the word

heirs added, she said: "In as much as the will has to be re-written, you might as well leave the property to Louis Beyer (her son) and Helen B. Johnson—put Helen Johnson in the will."

Dr. Smith, on page 77 of the record, says: "That is one thing that I do remember distinctly—that Mrs. Beyer exclaimed positively and with more emphasis than I thought she was capable of 'Where is Helen, you have left Helen out of the paper, I want her to go in'—and Mr. Brennan asked, who is Helen? and she said, 'My niece, Mrs. Johnson, she is to share equally with Mr. Beyer.'" Then again Brennan was asked in reply to Dr. Smith's statement about Helen going into the will. (See p. 91, of Record.)

Q. Dr. Smith has testified that Mrs. Beyer cried out on Sunday "Where is Helen?" and you asked who Helen was?

A. I do not remember an incident of her asking where Helen was.

And so there are many flat contradictions among the witnesses who testified in support of the will, to which I shall refer at the hearing.

The witnesses, Mrs. Stone and Fannie Perry, in no instance contradict themselves, but they are clearly corroborated in many instances by Mrs. Johnson and Mr. Beyer. (Record, p. 44.)

Witness PERRY:

Q. What did Mrs. Johnson say to Mrs. Beyer, and what did Mrs. Beyer say to Mrs. Johnson?

A. I have heard Mrs. Johnson ask Mrs. Beyer to make a will, but Mrs. Beyer said she would not make a will; that everything would be left to Mr. Beyer just as it was and for them to stay with Mr. Beyer and treat him right, and when he died he would do right by them.

Q. What did Mrs. Johnson say then?

A. This is the way you are going to treat me after I have been working for you all these years, and this will be all the thanks I'll get for doing it.

Mrs. Johnson (Record, p. 95) says: Mrs. Beyer said to Mrs. Johnson that Mr. Beyer would leave the property to her and Louis.

Is it a Natural Will?

The evidence is conclusive upon the following facts:

That the relations between this appellee and the deceased were warm, friendly and affectionate; that the relations between the appellant and the deceased were friendly and thoughtful; that while the property stood in her name it was her desire that he should have the benefit of it during his life; that when she learned that a will was essential to create such an interest in him, she makes a will for his sole benefit, with the understanding that if Mrs. Johnson and Beyer treated him right he would do right by them.

He never hears of the existence of this will until about July 30, 1896. On July 31, 1896, he is given the bulk of the estate by a deed of Mrs. Johnson and Mr. Beyer, Jr., (prior to *either of them being informed*, of the existence or contents of the will,) "so quickly he did not have time to be dissatisfied." (Record, p. 99.)

The appellant says these darling children were to hold the property for him, and keep him in check from spending the estate. In other words Mrs. Beyer placed $25,000 worth of property into their hands, absolutely, without bond or liability, with absolute power to dispose of it if they saw fit.

The facts are, that these darling children in whom it is said Mrs. Beyer had such supreme confidence concocted a scheme whereby they gained absolute control of the estate, and give the surviving husband, not the protection and

comforts of a home, but cast his clothes and trunks upon the street. (Record, p. 32, bottom.)

Would Mary Beyer knowingly confide her estate into such guardians to protect him, who, was the superior object of her bounty?

AS TO THE EFFECT OF THE STIPULATION IN THE CASE.

The appellant can not with good grace, be heard upon the question that the stipulation has a different effect upon these proceedings than its plain, adequate language meant to convey when it was entered into and adopted.

It is not competent for him now to take these objections after he finds the verdict against him. He assented to the issues, took his chance, and must bear the burden with the same grace he would have enjoyed the benefits.

I respectfully submit that this appellant, having alone filed his motion for a new trial before the law court, he recognized and re-adopted the mode of procedure mapped out in the original stipulation itself. By his motion for a new trial he re-assents to the very issues framed, and approves of the course adopted. This question was fully discussed in the Boyse *vs.* Rossborough case, 6 House of Lords Cases, p. 2, in which case all the facts are so strikingly similar, and the principles so well discused and clearly defined as to establish a strong precedent for these proceedings.

The Chancellor below also took this view, and said, (Record, p. 120).

The question of jurisdiction is, after all, not the issue as contended for by the appellant. It is purely a question of discretion whether the Chancellor shall direct an issue, *devisavit vel non* or remove an impediment to an ejectment.

I submit that when the appellant came forward and assented to have certain issues sent to the law court for trial by jury, the Chancellor had full jurisdiction to approve the

order certifying the issues. Boyse *vs.* Rossborough, 6 House of Lords Cases, 2.

AS TO THE MOTION FOR A NEW TRIAL IN THE COURT OF EQUITY.

While the record does not show a formal motion for a new trial renewed in the equity court, it is a fact, however, that the Chancellor carefully examined, weighed and considered all the testimony and proceedings in the law case, as is fully set forth in his opinion. He said on page 120 of the record, after expressing some doubt whether the parties having stipulated to send issues to a jury, and that a decree may be entered in accordance with said findings, can be allowed to ask the court to disregard the verdict, unless some material error has been committed in the trial:

> "Looking at the case from every standpoint, I have reached the conclusion that the verdict was one which the evidence warranted the jury in finding."
>
> "There is some conflict in the evidence, and there are some inferences of fact which would support the verdict, and which may fairly be drawn by a jury from the facts proven, and *I cannot convince myself* that any injustice has been done, *either by the circuit court or the jury* in the conclusion reached."

Surely this language should satisfy anyone that the Chancellor reached his just and proper conclusion only after carefully considering and weighing all the evidence and proceedings had before the law court, which testimony and proceedings were, by stipulation of all the parties, substituted for a new trial, or new testimony before the Chancellor, and sincerely submit that it may be pardonable to characterize the present contention of the appellant as decidedly trivial, if not unfair.

THOSE WHO BEST KNEW THE TRUE STATE OF FACTS RAISED BY THE ISSUES, REFUSED TO FURTHER CONTEST THE MATTER. The appellant stands in this court alone; never having controverted a single allegation of the appellees' bill of complaint, save those raised by the issues which he, by his solemn stipulation, entered into with his opposing counsel, submitted to the Court his *good faith* that a "decree shall be entered in accordance with said findings."

I submit the decree is proper and just, and it should be affirmed.

CLAYTON E. EMIG,
Attorney and Solicitor for the Appellee.